Nos. 14-2274 & 14-2275

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA (14-2274),

Plaintiff-Appellant,

SIERRA CLUB (14-2275),

Plaintiff-Appellant,

v.

DTE ENERGY COMPANY and DETROIT EDISON COMPANY,

Defendants-Appellees.

On Appeal From the U.S. District Court for the Eastern District of Michigan, No. 10-cv-13101 (Hon. Bernard A. Friedman)

RESPONSE OF PLAINTIFF-APPELLANT SIERRA CLUB TO PETITION FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION

The Court should deny Defendant-Appellees DTE Entergy Company and Detroit Edison Company's (collectively "DTE" or "Petitioners") Petition for Rehearing and Rehearing En Banc because Petitioners fail to meet the standards required for rehearing or rehearing en banc set forth in the Federal Rules of Appellate Procedure and the Sixth Circuit Internal Operating Procedures. In the previous appeal of this case, the Court framed the "single question" before it as follows: "[C]an [the Environmental Protection Agency ("EPA")] challenge [a preconstruction] projection before there is post-construction data to prove or disprove it?" *United States v. DTE Energy Co.* (*DTE I*), 711 F.3d 643, 644 (6th Cir. 2013). The Court answered the question – *yes* – relying on express statutory authority to support its holding. *See id.* at 650 (citing 42 U.S.C. § 7477). On remand, the district court held as a matter of law that a company's abuse of the demand growth exclusion when performing its preconstruction projection is not the proper subject of a Clean Air Act ("CAA") enforcement action, and that any such action is premature until post-project data reveal observed emissions increases. That holding by the district court was contrary to the plain requirements of the CAA and this Court's prior holding in *DTE I*, and the panel in the instant appeal was correct to reverse.

DTE has pointed to no error of fact or law in the opinion delivered by Judge Daughtrey or the separate opinion concurring in the judgment by Judge Batchelder that would warrant panel rehearing under Federal Rule of Appellate Procedure 40(a)(2) and Sixth Circuit Internal Operation Procedure (40)(a)(1). Fed. R. App. P. 40(a)(2); 6 Cir. I.O.P. 40(a)(1). Nor have Petitioners identified a precedent-setting error of exceptional public importance or an opinion that directly conflicts with court precedent as required by Federal Rule of Appellate Procedure 35 and Sixth Circuit Internal Operating Procedure 35(a). Fed. R. App. P. 35; 6 Cir. I.O.P. 35(a). On the contrary, both the opinion and the concurrence in *United States v. DTE Energy Co.* (*DTE II*), 845 F.3d 735 (6th Cir. 2017), are entirely consistent with the holding in *DTE I.* There is no cause to grant rehearing or rehearing en banc, and the Court should deny DTE's petition.

STANDARD OF REVIEW

The Sixth Circuit's standard for panel rehearing reflects the dictate of the Federal Rule of Appellate Procedure 40(a)(2), which requires a party's petition for rehearing to "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and . . . argue in support of the petition." Fed. R. App. P. 40(a)(2). Additionally, the Sixth Circuit Internal Operating Procedures require a "claimed error of fact or law in the opinion . . . [and not a] re-argument of issues previously presented." 6 Cir. I.O.P. 40(a)(1).

As with panel rehearing, the Sixth Circuit's standard for en banc rehearing reflects the dictate of Federal Rule of Appellate Procedure 35, which states that an en banc rehearing is not favored and will not ordinarily be ordered unless "(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). An en banc rehearing is necessary to secure or maintain uniformity if the "panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed." *Id.* 35(b)(1)(A). The proceeding involves a question of exceptional importance if, for example, it involves "an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." *Id.* 35(b)(1)(B).

Additionally, the Sixth Circuit Internal Operating Procedures require that a petition for rehearing en banc "bring to the attention of the entire court a precedent-setting error of exceptional public importance or an opinion that directly conflicts with Supreme Court or Sixth Circuit precedent." 6 Cir. I.O.P. 35(a). Furthermore, "[a]lleged errors in the determination of state law or in the facts of the case (including sufficient evidence), or errors in the application of correct precedent to the facts of the case, are matters for panel rehearing but not for rehearing en banc." *Id.*

ARGUMENT

I. THE OPINION AND CONCURRENCE ARE CONSISTENT WITH THE LAW OF THE CASE AND SIXTH CIRCUIT PRECEDENT.

DTE fails to demonstrate any error of law in the panel opinion or concurrence that would warrant rehearing. Judge Daughtrey, delivering the opinion in which Judge Batchelder joined in the result, accurately described the previous holding in *DTE I*: "On appeal, we reversed and remanded, holding that the EPA was authorized to bring an enforcement action based on projected increases in emissions without first demonstrating that emissions actually had increased after the project." *DTE II*, 845 F.3d at 737 (Daughtrey, J.) (citing *DTE I*, 711 F.3d at 649). Judge Batchelder's separate concurrence agreed: "the *DTE I* majority remanded for a ruling on USEPA's claim that DTE had technically or scientifically miscalculated the hypothetical pre-construction emissions." *Id.* at 745 (Batchelder, J., concurring in the judgment).

EPA and the Sierra Club claim that DTE performed the applicability analysis incorrectly by misusing the demand growth exclusion to simply zero out the post-project emissions increases that the company's own modeling projected would occur. Under this Court's ruling in *DTE I*, such a situation plainly provides ground for the present enforcement action.

Both Judge Daughtrey and Judge Batchelder correctly held that, in light of the holding in *DTE I*, the district court erred by rejecting EPA's challenge. *Id.* at

741 (Daughtrey, J.), 745 (Batchelder, J., concurring in the judgment). Their judgment in *DTE II* was entirely consistent with the law of the case and the circuit precedent, and there is no cause to grant panel rehearing.

Moreover, as Judge Daughtrey noted, all three panelists agree that the law of the case and the circuit is that "actual post-construction emissions have no bearing on the question of whether DTE's preconstruction projections complied with the regulations." *Id.* at 741 (Daughtrey, J.) (citing *id.* at 744-45 (Batchelder, J., concurring in the judgment), 749 (Rogers, J., dissenting)). In *DTE I*, the majority held that the preconstruction projection "determines whether the project constitutes a 'major modification' and thus requires a permit" and installation of modern pollution controls under the New Source Review ("NSR") program. *DTE I*, 711 F.3d at 644. Judge Daughtrey's opinion in *DTE II* echoes *DTE I*:

> the applicability of NSR must be determined before construction commences and [] liability can attach if an operator proceeds to construction without complying with the preconstruction requirements in the regulations. Post-construction emissions data cannot prevent the EPA from challenging DTE's failure to comply with NSR's preconstruction requirements.

DTE II, 845 F.3d at 741 (Daughtrey, J.). There is no conflict in the holdings between *DTE I* and *DTE II*, and DTE's request for rehearing should be rejected.

II. THE JUDGMENT OF THE PANEL IS CONSISTENT WITH PRECEDENT AND THE ISSUE PRESENTED DOES NOT RISE TO THE LEVEL OF EXCEPTIONAL IMPORTANCE.

As discussed above, both the opinion and concurrence are consistent with the law of the case and Sixth Circuit precedent. The judgments in *DTE I* and *DTE II* are the same: EPA is authorized to bring enforcement actions for unlawful preconstruction projections. Further, the holdings of both *DTE I* and *DTE II* are consistent with the legal precedent holding that an NSR violation ripens at the time of construction. *See, e.g.*, *United States v. Midwest Generation, LLC*, 720 F.3d 644, 647 (7th Cir. 2013); *United States v. EME Homer City Generation, L.P.*, 727 F.3d 274, 285 (3d Cir. 2013); *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1014 (8th Cir. 2010); *Nat'l Parks Conservation Ass'n, Inc., v. Tenn. Valley Auth.*, 502 F.3d 1316, 1322-23 (11th Cir. 2007).

DTE makes no attempt to demonstrate how the issue presented in this appeal is of exceptional importance. Instead, DTE vaguely suggests that courts and industry "are bereft of guidance as to how to comply with [the NSR] regulations." DTE Petition at 18 (ECF Doc. 39). They are not. The regulations are clear, but DTE determined to flout them. As such, DTE is liable for its regulatory and statutory violations.

DTE has not met the standard for rehearing en banc. Accordingly, this Court should deny DTE's petition.

Date: April 3, 2017

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH TYPE VOLUME LIMITATION

This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) as it was prepared using the Microsoft Word 2010 word processing program in 14-point Times New Roman type. Pursuant to the Court's March 9, 2017 notice filed in this case (ECF Doc. 41), this response does not exceed ten (10) pages.

Dated: April 3, 2017

/s/ Shannon Fisk
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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April, 2017, I served a copy of the foregoing upon the following counsel using the Sixth Circuit's electronic case filing system:

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In addition, I certify that a copy of the foregoing response was served via electronic mail to counsel in the related appeal, No. 14-2274:

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